IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

76-1808

NO. _____

UNITED STATES OF AMERICA,
Respondent

v.

JOHN PAUL GORTHY,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, John Paul Gorthy, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in the above case.

OPINIONS BELOW

Petitioner, John Paul Gorthy, was indicted on March 26, 1976, in cause number 76-C-52 in the United States District Court for the Southern District of Texas, Corpus Christi Division, on one count of unlawful possession of marijuana, with intent to distribute a controlled substance

under Schedule I of the Controlled Substance Act of 1970, to-wit: approximately four hundred twenty seven (427) pounds of marijuana, in violation of Title 21, United States Code, Section 841(a)(1).

Petitioner entered a plea of "Not Guilty" and waived his right of a jury trial and was tried before the Court in Corpus Christi, Texas. On July 15, 1976, prior to commencement of the trial, the Court heard evidence on Petitioner's Motion to Dismiss Indictment for Denial of a Speedy Trial and thereafter overruled the Motion and proceeded to trial. On July 23, 1976 the trial court issued its order denying Petitioner's Motion to Dismiss Indictment for Denial of a Speedy Trial and finding Petitioner guilty beyond a reasonable doubt of the crime charged by the indictment. A copy of that Memorandum and Order is printed as Appendix "A" to this petition.

After receiving sentence, Petitioner timely filed Notice of Appeal with the United States Court of Appeals for the Fifth Circuit. The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on April 15, 1977 and is as yet unpublished. A copy of that Opinion is printed as Appendix "B" to this petition. The order of the Court of Appeals below denying Petitioner's Petition for Rehearing was entered on May 19, 1977, and is printed as Appendix "C" to this petition.

JURISDICTION

The judgment sought to be reviewed from the United States Court of Appeals for the Fifth Circuit was originally entered on April 15, 1977. Appellant's request for Rehearing was denied without opinion on May 19, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

How much delay between arrest and trial must expire before a defendant is denied his right to a speedy trial?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI.—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

In a Memorandum and Order filed on July 23, 1976, the Court explained its reasons for overruling the Motion to Dismiss the Indictment for lack of Speedy Trial and made fact findings. The following is quoted from the Order of July 22, 1976:

> "The facts as the Court found them, and upon which the Court based its finding of Defendant Gorthy's guilt, are that on or about the 11th day of November, 1974, Ed Gerusa, a United States Border Patrol Officer, was working the permanent alien checkpoint below Sarita, Texas, when a Dodge motorhome, driven by Defendant Gorthy, stopped

at the point. There was nothing suspicious about the vehicle or its passengers prior to the time it stopped. Border Patrol Officer Gerusa, who was on the point, testified that he questioned the Defendant and a female passenger in the cab of the vehicle, as to their citizenship. Gerusa then testified he noticed the silhouette of a third person located in the motorhome living quarters. He further narrated that he asked Defendant Gorthy if he, Gerusa, could open the side door to the living quarters of the motorhome and question the third person as to his citizenship. The officer then stated that he opened the door, and still standing on the ground, leaned into the living area so as to better see and question said third person. In doing this, Officer Gerusa stated that he detected a strong odor of marijuana emanating from within the living quarters. The door of a nearby closet was opened by Officer Gerusa, who found there burlap bags of marijuana. A subsequent search of the vehicle revealed approximately 428 pounds of marijuana inside the vehicle."

After the search and arrest, Petitioner was placed in Nueces County Jail and bond was set at Ten Thousand Dollars ($10,000.00), 10% deposit. On November 21, 1974 Appellant deposited One Thousand Dollars ($1,000.00) with the United States District Clerk and was released on bond and allowed to return home to Key Largo, Florida, pending further disposition of his case.

At the time of his arrest at the Sarita checkpoint, Petitioner was the owner/driver of a 1973 Dodge Huntsman motorhome valued at approximately Ten Thousand Dollars ($10,000.00). After the search of the Dodge Huntsman motorhome and the arrest of Petitioner, the motorhome was seized by the Border Patrol and Drug Enforcement Agency and has remained in the possession

of the United States Government since the date of Petitioner's arrest.

On October 16, 1975, eleven months after the arrest, counsel for Petitioner contacted United States Magistrate Phillip A. Schraub and requested a speedy disposition of Petitioner's pending complaint. Shortly thereafter, Petitioner filed a Motion to Quash the Complaint and Return Security Deposited as Bond and on March 9, 1976, Petitioner filed a Supplemental Motion to Quash the Complaint and Return Security Deposited as Bond and therein set out specifically the number of Grand Juries which had been convened since the date of his arrest and a number of other indictments returned by Corpus Christi Division Grand Juries during the intervening seventeen months. Two weeks later on March 26, 1976, Petitioner was indicted.

REASONS FOR GRANTING THE WRIT

Petitioner claims that the Trial Court committed error when it did not dismiss the indictment because of failure by the Government to comply with the Southern District of Texas' Speedy Trial Plan for the prompt disposition of criminal cases adopted under the mandate of Rule 50(b), Federal Rules of Criminal Procedure, and 18 U.S.C. Section 3164, a denial of the right to a speedy trial as guaranteed by the Sixth Amendment, an unnecessary delay in bringing the Petitioner to trial in violation of Rule 48(b), Federal Rules of Criminal Procedure.

Rule 48(b) provides:

> "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information

> against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing the defendant to trial, the court may dismiss the indictment, information, or complaint."

The Sixth Amendment provides in pertinent part that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial. . . ."

While Rule 48(b) is a statutory enactment of the Sixth Amendment right to a speedy trial, the Rule contemplates more:

> "It is a restatement of the inherent power of the court to dismiss a case for want of prosecution, and that power of the court is not circumscribed by the Sixth Amendment." *U.S. v. Dallago,* 311 F. Supp. 227 (E.D.N.Y., 1970). 3 Wright, Federal Practice & Procedure, Section 814 at 309, 310.

Petitioner was arrested on November 19, 1974, for possession with intent to distribute marijuana and placed in Nueces County Jail and bail was set at Ten Thousand Dollars ($10,000.00), ten per cent (10%) deposit. Two days later Petitioner posted bond and was released. Seventeen (17) months thereafter, on March 26, 1976, Petitioner was indicted and trial began on July 15, 1976, over twenty-one (21) months after his arrest.

In considering whether a defendant has been denied his Sixth Amendment Constitutional right for a speedy trial, this Court in *Barker v. Wingo,* 407 U.S. 514 (1972) has delineated the criteria by which such claims are to be judged. This case established a balancing test, in which the conduct of both the prosecution and defendant are

weighed and identified four factors which are of prime importance: length of delay, a reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. These factors are not to be treated independently as separate prerequisites to the Sixth Amendment mandate for a speedy trial, but rather they are interrelated factors and must be considered together with such other considerations as may be relevant to the particular case. See e.g., *United States v. Baumgarten,* 517 F.2d 1020 (8th Cir. 1975); *United States v. Geller,* 481 F.2d 275 (9th Cir. 1973); *United States v. Lasker,* 481 F.2d 229, 237 (2nd Cir. 1973).

(a) Length of Delay

Turning to an examination of the factors as they relate to this case the threshold question of the length of delay of over twenty-one (21) months appears to be long enough delay to trigger the considerations of the other balancing factors. *Barker v. Wingo,* supra, 407 U.S. at 530-31.

(b) Reason for the Delay

The government has not come forward with any explanation for the twenty-one (21) month delay in the prosecution of the Petitioner, and therefore, any assumption made by the Petitioner for the delay would be mere speculation. However, since the date of the arrest on November 19, 1974, the government had all the investigation it needed to go to trial. This was not a complex conspiracy case with numerous witnesses and surveillance, and all the government's witnesses and evidence had been at the government's fingertips since the date of the arrest. Therefore, any delay or negligence in bringing this case

to trial was solely on behalf of the Office of the United States Attorney.

The United States Court of Appeals for the Fifth Circuit held that the government has a duty to press criminal cases to trial, to give them any necessary priority and to prevent whenever possible, even the suggestion of staleness. *United States v. Mark II Electronics of Louisiana, Inc.*, 305 F.Supp. 1280 (E.D. La. 1969). Additionally, the Petitioner points out that he never requested any continuance or extension of time. Any delay in the prosecution of Petitioner was not of his making. Therefore, a twenty-one (21) month delay, in light of the simple nature of this case and without justification, violates the expeditiousness requirement of the Sixth Amendment.

(c) Prejudice to Defendant

Many courts have held that this aspect of the right to a speedy trial is the most important factor to be considered, e.g. *United States v. Mark II Electronics of Louisiana, Inc.*, supra; *Trigg v. Mosley*, 433 F.2d 364 (10th Cir. 1970); *State v. Rice*, 235 N.E.2d 732 (Ohio 1968). Our Constitution presumes prejudice from the fact of trial other than speedy. Otherwise, the constitutional guarantee has no purpose. This Court has stated generally that the right to a speedy trial exists, ". . . . to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern . . . . and to limit the possibility that long delay will impair the ability of an accused to defend himself." *United States v. Ewell*, 383 U.S. 116 at 120 (1966). In the present case, the delay of seventeen (17) months before the prosecution was even begun and twenty-one (21) months until the trial was both unnecessary and of

substantial length, and it therefore follows that Petitioner's Sixth Amendment right to be free of the needless personal hardship and anxiety attendant to an unnecessary delay in prosecution has been significantly invaded. *United States v. Colitto*, 319 F.Supp. 1077 (E.D. N.Y. 1970). Additionally, Petitioner testified regarding his economic difficulties during the period of the government's inaction and has established a prima facie case of prejudice. *United States v. Dyson*, 469 F.2d 735 (5th Cir. 1972).

(d) Petitioner's Assertion of His Right to a Speedy Trial

Petitioner has diligently asserted his right and attempted to obtain a speedy trial. On October 16, 1975, Petitioner filed a letter with United States Magistrate Phillip A. Schraub requesting that his case be presented to a grand jury or be dismissed. When he received no action on this request for a speedy presentation of his case to a grand jury, Petitioner filed a Motion to Quash Complaint and Return the Security Deposit as Bond setting out in detail the reasons why his complaint should be quashed, those reasons being based on the fact that although he was arrested almost seventeen (17) months ago his case has still not been presented to a grand jury and he had not been indicted.

In a further effort to obtain a speedy trial and in support of his Motion to Quash the Complaint and Return Security Deposited as Bond, Petitioner filed a Supplemental Motion to Quash the Indictment on the 9th day of March, 1976, wherein he set out the specific number of grand juries that had convened since November 19, 1974, and totaled the number of indictments which were

returned by the Corpus Christi Division grand juries since November 19, 1974.[1]

Petitioner attempted in every way known to him to obtain a speedy indictment and speedy trial. Under the existing law it is not his duty, but rather the government's duty to seek prosecution. It is commonly understood that a defense attorney will hesitate to disturb the hushed inaction by which dormant cases have been known to expire.

It seems to be apparent that the United States Government is attempting to do prior to the indictment of Petitioner, that which it would prohibited from doing by the Sixth Amendment, Rule 48(b), Rule 50(b), and "The Plan" after Petitioner had been indicted.

This Court has sanctioned the promulgation, by courts or legislatures, of stringent non-constitutional quantitative tests for determining if there had been a violation of the accused's right to a speedy trial. Just such a test was created by "The Plan" prepared by the District Courts of the Southern District of Texas pursuant to the com-

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1. These figures are as follows:

1.	February 11, 1975	31 Indictments;
2.	March 28, 1975	12 Indictments;
3.	May 12, 1975	1 Indictment;
4.	June 2, 1975	6 Indictments;
5.	June 18, 1975	5 Indictments;
6.	September 19, 1975	15 Indictments;
7.	October 20, 1975	2 Indictments;
8.	October 24, 1975	16 Indictments;
9.	December 15, 1975	35 Indictments;
10.	December 19, 1975	45 Indictments.

In 1975 a total of One Hundred Sixty Eight (168) Indictments were returned by Corpus Christi Grand Juries.

In 1976, the Grand Jury convened one (1) time prior to this indictment on February 19, 1976, and returned fourteen (14) indictments.

mand of Rule 50(b). "The Plan" merely flushes out the skeleton of Rule 48(b), by giving content of the sweeping phrase, "unnecessary delay"; "The Plan" places affirmative duty on the Government to bring defendants to trial. Because defendants have no burden under "The Plan", neither lack of prejudice nor lack of demand on the part of the defendants will justify non-compliance by the Government or the courts.

Granted "The Plan" was also written to be effective only after a defendant has been indicted. However, one must look, if possible, into the minds and intentions of the judges in the Southern District of Texas who created "The Plan" and ask if the actions of the United States Government in this case, does not violate the very essence of why implementation of such a plan became necessary.

The purpose of "The Plan" is to minimize undue delay and to further the prompt disposition of criminal cases and to protect a defendant's constitutional right to a speedy trial.

Petitioner John Paul Gorthy had no way to assert his right to a speedy trial prior to indictment, and, under the law and "The Plan" it was not his duty, but rather the Government had such duty. In any event, Petitioner's assertion or failure to assert his right to a speedy trial is just one of the many factors to be considered in the balancing test inquiry into the depreciation of his constitutional rights. The length of delay, the reason for delay, and the prejudice to the defendant, outweigh, by far, the defense counsel's understandable reluctance to secure his client's constitutional rights to a speedy trial. However, here as noted in the opinion of the United States Court of Appeals for the Fifth Circuit, Petitioner had asserted his right and did attempt to obtain a speedy trial.

The Government has not offered any explanation for this unreasonable delay other than to rely on statistics compiled by Petitioner showing that more than one hundred seventy two (172) indictments have been returned by eleven (11) grand juries convened in the Corpus Christi Division of the Southern District of Texas. This obviously is not sufficient for such undue delay in light of Petitioner's repeated requests for a speedy trial.

CONCLUSION

Petitioner respectfully concludes to the Court that the unreasonable delay of more than twenty-one (21) months from the time of his arrest to the date of trial was a denial of his right to a speedy trial and therefore his indictment should be dismissed. For the reasons stated above the conviction should be reversed and the cause remanded to the trial court with directions to dismiss the indictment.

Respectfully submitted,

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By: _____
C. ANTHONY FRILOUX, JR.

By: _____
GERALD A. WOOLF

Attorneys for Petitioner
John Paul Gorthy

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed to Mr. Edward McDonough, United States Attorney, attorney for Respondent, Federal Building, 515 Rusk, Houston, Texas 77002, on the _____ day of June, 1977, by depositing same in the United States Mail properly stamped and addressed.

_____
GERALD A. WOOLF

APPENDIX "A"

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CR. NO. 76-C-52

UNITED STATES OF AMERICA
v.
JOHN PAUL GORTHY and
WILLIAM SHAWN BOLTON

(Filed July 23, 1976)

MEMORANDUM AND ORDER

Defendants John Paul Gorthy and William Shawn Bolton were charged in a one-count indictment with possession with intent to distribute approximately 427 pounds of marijuana, a controlled substance under Section 812(c)(10) of the Controlled Substances Act of 1970, in violation of 21 U.S.C. §841(a)(1). The Court called the case for trial on July 15, 1976. The jury had been previously selected. The Defendant Bolton, through his attorney, requested a delay because he was hospitalized and unable to proceed with the trial at this time. The Defendant Gorthy, not wanting the delay, agreed to waive a trial by jury if his trial could proceed before the Court without delay. Consequently, the Court severed the case against Defendant Gorthy and the jury trial of Defendant Bolton was reset for the 22nd day of July, 1976. The case against Defendant Gorthy, after he had executed a waiver of jury trial, proceeded to trial before the Court. This

memorandum and order is concerned only with the trial of John Paul Gorthy.

The first matter the Court considered was Defendant Gorthy's motion to dismiss the indictment against him because of the delay from arrest to indictment of 18 months, in contravention of 18 U.S.C. §3161(b) and (f), the Speedy Trial Act. Such motion, after the Court heard the evidence presented, was denied. The nature of the evidence presented and the basis of the Court's denial of such motion will be discussed later on in this Memorandum and Order.

Before the government proceeded with its case in chief, the Court announced that Defendant's motion to suppress, which had been timely filed, was to be carried along and that, at the conclusion of the government's case, the Defendant would have an opportunity to put on evidence for the limited purpose of the motion to suppress.

Since this case is a so-called checkpoint case and involves the stopping of a Dodge motorhome at the Sarita, Texas, checkpoint, the Court then took judicial notice of the location, justification and other physical aspects of said Sarita checkpoint, and it signed an order putting into the record as evidence Court's Exhibits "A" and "B," being orders of this Court filed on July 30 and September 12, 1974, in *United States of America v. [illegible] Asencion Garcia,* Cr. No. 72-C-62, in the [illegible]ict Court for the Southern District of Texas, Corpus Christi Division. These orders made detailed findings of fact concerning said Sarita, Texas, checkpoint.

At the conclusion of the government's case, the Defendant took the stand and testified on his motion to suppress. He attacked the validity of the stop of the

vehicle involved and the manner in which it was searched and the seizure of the marijuana was made. Thereafter, the Court orally and in open court denied the motion to suppress. The Defendant then rested and closed.

The Court found the Defendant guilty of the offense charged in the indictment. In doing so, the Court briefly stated certain essential findings of fact and conclusions of law into the record. It then announced that a written memorandum would be filed enlarging its findings and its conclusions. To carry out such announcement is the purpose of this rather extensive memorandum.

In cases of this kind, where marijuana has been seized in large quantities by virtue of a search of a vehicle at a checkpoint, the crux of the matter is the motion to suppress. There is no doubt that the law was violated in this case. But, the query is, was the seized contraband admissible in evidence? If not, the government's case collapses. So, the Court, having heard the testimony of the government's witness, and the testimony of Defendant Gorthy which was offered solely on the motion to suppress, had to make findings in this regard.

The facts as the Court found them, and upon which the Court based its finding of Defendant Gorthy's guilt, are that on or about the 11th day of November, 1974, Ed Gerusa, a United States Border Patrol officer, was working the permanent alien checkpoint below Sarita, Texas, when a Dodge motorhome, driven by Defendant Gorthy, stopped at the point. There was nothing suspicious about the vehicle or its passengers prior to the time it stopped. Border Patrol Officer Gerusa, who was on the point, testified that he questioned the Defendant and a female passenger in the cab of the vehicle, as to their

citizenship. Gerusa then testified he noticed the silhouette of a third person located in the motorhome living quarters. He further narrated that he asked Defendant Gorthy if he, Gerusa, could open the side door to the living quarters of the motorhome and question the third person as to his citizenship. The officer then stated that he opened the door and, still standing on the ground, leaned into the living area so as to better see and question said third person. In doing this, Officer Gerusa stated that he detected a strong odor of marijuana emanating from within the living quarters. The door of a nearby closet was opened by Officer Gerusa, who found there burlap bags of marijuana. A subsequent search of the vehicle revealed approximately 428 pounds of marijuana inside the vehicle.

The Defendant Gorthy, testifying on the motion to suppress, contradicted Officer Gerusa's testimony by stating that the third person, who was in the rear of the living quarters, could not have been seen from where Officer Gerusa initially stood, that the officer was not given permission to open the door to the living area of the vehicle and that he was inside the vehicle before he saw the third person or smelled the marijuana. Defendant Gorthy's testimony was not convicing and the Court chose to believe the officer's story. However, even if the contradicting facts had been found by the Court to be accurate, this Court does not believe the Defendant's Fourth Amendment rights were violated by the search and seizure of the marijuana here involved under the recent United States Supreme Court decision in *United States v. Martinez-Fuerte*, No. 74-1560, and its companion case, *Sifuentes v. United States*, 75-5387, July 6, 1976.

Consequently, at the conclusion of the government's case and after Defendant Gorthy had testified on his

motion to suppress, the Court concluded, and now reiterates such conclusion, that the Defendant's Fourth Amendment right to be free from unreasonable searches and seizures was not violated by the actions of Border Patrol Officer Gerusa. So-called checkpoint cases have been before this Court time and again as a result of marijuana seizures at the point south of Sarita, Texas, and at the point south of Falfurrias, Texas. There presently appears to be no doubt that the border patrolman who worked the point below Sarita had, in this case, the legal right to stop the vehicle driven by the Defendant Gorthy and to inquire as to his citizenship and as to the citizenship of the woman passenger in the cab of the vehicle. *Martinez-Fuerte* and *Sifuentes, supra.*

There is another justification for sustaining the validity of the search made by the Border Patrol agent in this case besides the above-cited recent United States Supreme Court decision. On numerous prior occasions, and as it has done heretofore in this case, the Court has taken judicial notice of the location, justification and other physical aspects of the Sarita checkpoint and has concluded such facts do establish that the permanent alien checkpoint near Sarita, Texas, where this Defendant was stopped, constitutes a functional equivalent of the border. While a determination of the validity of such conclusion may no longer be needed in the light of *Martinez-Fuerte* and *Sifuentes, supra,* we discuss the matter briefly. We wish to point out that there are similar checkpoints near Sierra Blanca, Texas, and near La Gloria, Texas, each of which has been held to be a functional equivalent of the border. *United States v. Hart,* 506 F.2d 887, 895-897 (5th Cir.), vacated and remanded, 422 U.S. 1053, affirmed 525 F.2d 1199 (5th Cir. 1976); *United States*

v. Fuentes, 379 F.Supp. 1145 (S.D. Tex. 1974), affirmed 517 F.2d 1401 (5th Cir. 1975); and *United States v. Santibanez,* 517 F.2d 922 (5th Cir. 1975); *United States v. Gonzales-Alvarez,* 528 F.2d 1056 (5th Cir. 1976, No. 75-3537, Summary Calendar). So, we are convinced that a "non-probable cause search" made at a point that is the functional equivalent of the border can be a "valid border search which [meets] the Fourth Amendment requirement of reasonableness." See *Hart, supra.* However, to urge this point now seems academic.

In *Martinez-Fuerte,* a driver and two passengers were in a vehicle that was stopped for questioning at a permanent checkpoint being operated in the State of California. The passengers proved to be illegal aliens, and the driver was charged with two counts of illegally transporting aliens. The same Sarita, Texas, checkpoint as is here involved was also at issue in *Sifuentes.* In that case, the Defendant Sifuentes was the driver of a car containing four passengers. He was stopped at the checkpoint and inquiry as to citizenship was made. All four passengers were illegal aliens, and Sifuentes was charged with four counts of illegally transporting aliens. The rationale of the United States Supreme Court in holding that stops at these checkpoints for the purpose of inquiry as to citizenship revolved around a balancing test of rights under the Fourth Amendment versus the government interest in preventing illegal alien entry. The Court stated: "[w]hile the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interest is quite limited." *Martinez-Fuerte, supra,* at 14. "[W]e hold that stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by war-

rant." *Id.* at 22. Therefore, the stop of Gorthy's motorhome in this case was not an unreasonable action forbidden by the Fourth Amendment.

The Border Patrol agent being legally authorized to stop the Dodge motorhome and to interrogate the front-seat occupants as to their citizenship, the defensive reliance which Defendant Gorthy placed upon the manner by which the officer entered the living quarters of the vehicle seems misplaced. Even if Defendant Gorthy insisted, correctly, that Officer Gerusa could not have seen Bolton, the third person in the vehicle, until he was actually inside its living quarters, we see no problem. The language of *Martinez-Fuerte* and *Sifuentes, supra,* does not indicate any intent to preclude a border patrolman from determining, by looking inside a vehicle the size of this one to find out, how many occupants there may be in it.

However, in support of the Court's interpretation just stated of the *Martinez-Fuerte* decision, further discussion is necessary. Defendant Gorthy was driving a Dodge motorhome, about 22 feet in length and perhaps 8 feet in width. The vehicle consisted of a cab unit where Defendant, being the driver, and a female passenger were sitting and clearly visible to Border Patrol Agent Gerusa. The third passenger was in the rear section of the vehicle, that is, the living quarters or "home" section. The agent testified that he detected the silhouette or shadow of this third individual by "skylighting" the vehicle, that is, by use of the daylight he was able to see the shadow of the person. But, suppose he didn't. This Court does not believe such change in the fact situation would in any way affect the validity of the search and seizure here. Be-

cause *Martinez-Fuerte* and *Sifuentes* clearly permit an officer to question all occupants in a vehicle as to their citizenship, it follows that the officer has the right to make some effort to determine how many passengers are in the vehicle and proceed to question all such individuals. It is not reasonable to say otherwise. We cannot accept any premise that says *Martinez-Fuerte* and *Sifuentes* intended to allow a Border Patrol officer to stop a vehicle and then only permit him to interrogate the persons in plain view. The officer must have the authority to look through any vehicle in order to determine the number of occupants in it. Otherwise, a lone driver in such a vehicle, with curtains drawn, could be stopped and interrogated and passed on with a load of aliens stacked in the living quarters of the mobilhome undetected.

So, we find no fault with the officer's entry into the living quarters of the motorhome and his interrogation of the third passenger, whether Officer Gerusa had seen before he entered the vehicle or not. It then follows that in the course or following this procedure, when the officer noticed the odor of marijuana, he had probable cause to open the closet door and searce for contraband. *United States v. Santibanez*, 517 F.2d 922 (5th Cir. 1975); *United States v. Coffey*, 520 F.2d 1103 (5th Cir. 1975).

While the Border Patrol agent may not have had the authority to search the contents of the bags under the immigration laws of the United States, he was empowered under the circumstances to search the burlap bags in the trailer closet pursuant to the authority of the customs laws. The Fifth Circuit has discussed this dual role of Border Patrol agents in *United States v. McDaniel*,

463 F.2d 129 (1972). "It appears that Border Patrol agents wear two hats, one as an immigration officer and the other as a customs officer." *McDaniel, supra*, at 134. *United States v. Bird*, 456 F.2d 1023 (5th Cir. 1972); and *United States v. Maggard*, 451 F.2d 502 (5th Cir. 1971). This being the case, the agent, as long as he had adequate grounds for suspecting the presence of marijuana, could don his customs hat and search for contraband. Here, Officer Gerusa smelled marijuana, opened a closet door, saw burlap bags with Mexican markings on them, and when he opened the bags he found marijuana. Probable cause certainly existed once the smell of marijuana was apparent to Border Patrol Officer Gerusa. Under all the circumstances, the search of the vehicle was reasonable under the customs and immigration laws and within the otherwise stricter confines of the Fourth Amendment.

The Court, as earlier stated, denied the Defendant's motion to dismiss the indictment. At this point, a further discussion of the basis for the Court's action seems advisable. We recognize that the Sixth Amendment right to a speedy trial is activated whenever a defendant becomes accused, either through arrest or otherwise. *Dillingham v. United States*, 423 U.S. 64 (1975); *United States v. Duke*, 527 F.2d 386 (5th Cir. 1976). Defendant, however, has not made allegations sufficient to succeed in the balancing test of *Barker v. Wingo*, 407 U.S. 514 (1972). The record in this case reveals that Defendant was arrested on November 11, 1974, and the indictment was returned against him and filed on March 26, 1976. The record shows that during this period of time several grand juries were convened in the Southern District of Texas, and in the Corpus Christi Division in

particular. Defendant argues that this delay directly violates the time limits contained in the Speedy Trial Act, 18 U.S.C. §§3161(b) and (f). But, this Court concluded that this Defendant Gorthy has not made the requisite showing to demonstrate a violation of his right to a speedy trial.

In his motion to dismiss, Defendant Gorthy alleged various matters of prejudice suffered by him. However, testimony given on the motion to quash the indictment showed no lost witnesses or faulty memories. Neither did he allege or show any deliberate attempt on the part of the government to delay the trial in order to hamper the defense. Most of his evidence related to the fact that he built custom furniture and was a crawfish fisherman in Florida. He charged, by a number of general self-serving statements, that the outstanding charges against him interfered with his business activity and that he failed to enter a business partnership there because of a desire to conceal his criminal indictment in Texas. His testimony was certainly not convincing.

In October, 1975, Defendant's counsel did send a letter to the U.S. Magistrate, stating his intent to file a motion to dismiss the complaint if an indictment was not had in thirty days. On January 27, 1976, the motion to dismiss was filed. However, no assertion of Defendant's right to a speedy trial was made prior to that. Defendant has failed to allege or prove "oppressive pretrial incarceration," "anxiety and concern," or "impairment of his defense." *Barker v. Wingo, supra.* The Court concluded that Defendant's constitutional right to a speedy trial was not violated, and the motion to dismiss was therefore denied.

Further, we are not concerned with a claimed violation of the Plan for the United States District Court for the Southern District of Texas for Achieving Prompt Disposition of Criminal Cases, adopted pursuant to Rule 50(b), because the Plan does not contain any time limit applicable to this post-arrest, pre-indictment period that Defendant complains about. This further supports the Court's denial of said motion to dismiss.

There is one further element of the offense charged by indictment in this case. The charge is that this Defendant possessed the marijuana with intent to distribute it. So, we point out that the testimony of the government's expert witness, Mr. Ed Albers, established the material seized to be marijuana and that the amount involved was 428 pounds. These facts warranted the Court in finding the Defendant possessed this quantity of marijuana with intent to distribute it, and the Court so found.

Based on the evidence in this case, the Court found the Defendant guilty, beyond a reasonable doubt, of the offense charged in the indictment.

The Defendant Gorthy is ordered to appear before this Court for sentencing on the 30th day of August, 1976, at 2:00 p.m. The Court has ordered a pre-sentence investigation as to this Defendant.

The bail of Defendant will continue in effect until the date for sentencing above set by this Court.

SIGNED this 22nd day of July, 1976.

OWEN D. COX
United States District Judge

APPENDIX "B"

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN PAUL GORTHY,
Defendant-Appellant.

NO. 76-3538

Summary Calendar.*

United States Court of Appeals,

Fifth Circuit.

April 15, 1977.

Defendant was convicted in the United States District Court for the Southern District of Texas, at Corpus Christi, Owen D. Cox, J., of possession of marijuana with intent to distribute, and he appealed. The Court of Appeals, Clark, Circuit Judge, held that a border patrol officer had probable cause sufficient to support a search of the vehicle in which defendant was riding and that defendant had not been denied a speedy trial.

Affirmed.

Appeal from the United States District Court for the Southern District of Texas.

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* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of N. Y. et al.*, 5 Cir., 1970, 413 F.2d 409, Part I.

Before GOLDBERG, CLARK and FAY, Circuit Judges.

CLARK, Circuit Judge.

John Paul Gorthy, defendant, appeals from a judgment of conviction under 21 U.S.C. § 841(a)(1) for possession of marijuana with intent to distribute and subsequent sentence entered September 1, 1976. We affirm.

[1] Gorthy argues that the seizure of marijuana from his 1973 Dodge Huntsman Motor Home by Border Patrol Officer Gerusa at the Sarita checkpoint was without probable cause and violates his Fourth Amendment rights. As Gorthy was approaching and stopping his motor home at the Sarita checkpoint on November 19, 1974, Officer Gerusa saw Gorthy, who was driving, a female who was sitting on the vehicle's right front seat, and the silhouette of a third person in the rear of the vehicle. Gerusa stepped up to the open window on the passenger side and asked Gorthy and the female if they were United States citizens. After receiving affirmative answers, Gerusa asked permission to open the side door of the motor home in order to speak to the person in the rear of the motor home. Gorthy replied that it would be "alright to open the door." Upon opening the side door, Gerusa leaned into the motor home so that he could see and question the third person. In doing so, Gerusa testified that he detected a strong odor of marijuana from within the living quarters of the motor home. Gerusa stepped into the motor home, opened a nearby closet, and found several burlap bags of marijuana. All three persons were arrested, and a search of the entire vehicle revealed approximately 427 pounds of marijuana. The district court's finding, on the motion to suppress, that Gerusa detected

the smell of marijuana when he opened the side door of the vehicle is not clearly erroneous and constitutes probable cause sufficient to support Gerusa's subsequent search.[1]

[2] Gorthy also argues that the 17-month delay between his November 19, 1974 arrest and July 15, 1976 non-jury trial violates his statutory rights under the 1976 Speedy Trial Act, 18 U.S.C. § 3164, the Rule 50(b) Plan for the United States District Court for the Southern District of Texas, and Federal Rule Criminal Procedure 48(b) and his constitutional rights under the Sixth Amendment speedy trial clause.[2] After Gorthy's arrest, he was placed in the Neuces County Jail, and his bond was set at $10,000, with a 10% deposit. Gorthy deposited $1,000 with the United States District Clerk on November 20, 1974, was released on bond that same day, and permitted to return to his home in Key Largo, Florida,

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1. E. g., *United States v. Garza*, 547 F.2d 1234 (5th Cir. 1977); *United States v. Leal*, 547 F.2d 1221 (5th Cir. 1977); *United States v. Mendoza*, 547 F.2d 962 (5th Cir. 1977); *United States v. Duncan*, 547 F.2d 903 (5th Cir. 1977); *United States v. Bazan-Molina*, 544 F.2d 193 (5th Cir. 1976); *United States v. McCrary*, 543 F2d 554 (5th Cir. 1976); *United States v. Diaz*, 541 F.2d 1165 (5th Cir. 1976); *United States v. Vallejo*, 541 F.2d 1164 (5th Cir. 1976); *United States v. Kidd*, 540 F.2d 210 (5th Cir. 1976); *United States v. Garza*, 539 F.2d 391 (5th Cir. 1976); *United States v. Rojas*, 538 F.2d 670 (5th Cir. 1976); *United States v. Torres*, 537 F.2d 1299 (5th Cir. 1976); *United States v. Coffey*, 520 F.2d 1103 (5th Cir. 1975); *United States v. Cantu*, 504 F.2d 387 (5th Cir. 1974).

2. The district court's opinion notes that Gorthy's arrest took place on November 11, 1974. The docket sheet, entries in the record, such as the United States Grand Jury's Indictment, and Gorthy's Motion to Dismiss Indictment for Denial of a Speedy Trial, all note, however, that the arrest took place on November 18 or 19 of 1974. The disparity between dates does not affect this court's disposition of Gorthy's speedy trial arguments.

pending further disposition of his case. On October 16, 1975, Gorthy's attorney wrote a letter to the United States Magistrate informing him that, as Gorthy's attorney, he had contacted the United States District Attorney's office in charge of the case several times, that he had not been informed of the reasons for post-arrest delay, and that, if he did not hear from the United States District Attorney within 30 days, he would move to dismiss the complaint filed against Gorthy. Gorthy's attorney filed a motion to quash the complaint on January 16, 1976, which was set for submission under the district court's local rule 16 on January 26, 1976. A supplemental motion to quash the complaint was filed on March 9, 1976; it set forth the number of Corpus Christi Division grand juries which had convened and the number of indictments returned by them since the date of Gorthy's arrest, 17 months earlier.

A grand jury indicted Gorthy and William Shawn Bolton, the passenger in the rear of the motor home vehicle, for violating 21 U.S.C. § 841(a)(1), on March 26, 1976. They were arraigned on April 19, 1976; both pled not guilty, and docket call was set for May 10, 1976. Gorthy then moved to dismiss the indictment for denial of a speedy trial on May 6, 1976. At the docket call on May 10, 1976, Gorthy's attorney, who up to that time had represented both Gorthy and Bolton, advised the district court that a conflict of interest existed between the two defendants and that he was unable to represent Bolton. The district court appointed a public defender to represent Bolton and set the jury selection date for June 14, 1976. The jury was selected on that date. After a hearing on Gorthy's motion to dismiss the indictment on July 15, 1976, the motion was denied, and the case

was called for trial. The public defender representing Bolton requested a delay, however, because Bolton was hospitalized and unable to proceed with the trial at that time. Gorthy waived a jury trial; the district court severed his case and proceeded to hear it that same day.

Since Gorthy was arrested prior to July 1, 1975, the Speedy Trial Act of 1974 does not apply to his case. 18 U.S.C. §§ 3161(b), 3163(a)(1); *see United States v. Garza,* 547 F.2d 1234 (5th Cir. 1977). The initial Rule 50(b) Plan for the United States District Court for the Southern District of Texas became effective on September 29, 1975. Its specified time intervals did not cover the period between arrest and information or indictment. Thus Gorthy's rights under that plan did not arise until March 26, 1976, when he and Bolton were indicted. Gorthy was subsequently arraigned, tried, and sentenced within that plan's applicable time limits. *Id.* ¶¶2(a), (b), (c). The Southern District adopted an amended Speedy Trial Plan to comply with the requirements of 18 U.S.C. § 3165(c). This plan became effective July 1, 1976, a date prior to the commencement of Gorthy's trial. Gorthy is not entitled to relief under this amended plan because he was arraigned, tried, and sentenced within its applicable time provisions also. Speedy Trial Plan ¶¶4(a)(4), 5(a)(1), 7(a). Additionally, our disposition of Gorthy's Sixth Amendment claim renders it unnecessary for us to treat his argument that the district court erred in not exercising its authority under Federal Rule Criminal Procedure 48(b). *See United States v. Clendening,* 526 F.2d 842, 844 n. 2 (5th Cir. 1976); *United States v. Palmer,* 502 F.2d 1233, 1234 n. 3 (5th Cir. 1974), *rev'd and remanded on other grounds sub nom., United States v. Dillingham,* 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975), *aff'd, United States v. Palmer,* 537 F.2d 1287 (5th Cir. 1976).

Gorthy's Sixth Amendment claim must be adjudged under the four-pronged test of *Barker v. Wingo,* 407 U.S. 514, 530-33, 92 S.Ct. 2182, 2192-93, 33 L.Ed.2d 101 (1972): "length of the delay, the reasons for the delay, the defendant's assertion of his right, and prejudice to the defendant." *See United States v. Avalos,* 541 F.2d 1100 (5th Cir. 1976). *See generally* Hansen & Reed, *The Speedy Trial Act of 1974 in Constitutional Perspective,* 47 Miss. L.J. 365, 374-77 (1976). For the purposes of computing the length of the delay, *Dillingham v. United States,* 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975), requires us to begin with the date of Gorthy's arrest. *Accord, United States v. Garza,* 547 F.2d 1234 (5th Cir. 1977); *Fagan v. United States,* 545 F.2d 1005 (5th Cir. 1977). The length of delay between the date of Gorthy's arrest and his indictment is 17 months and between the date of arrest and his trial is 21 months. This court has found that a 22-month delay between arrest and indictment is insufficient in itself to require a dismissal of an indictment, *United States v. Palmer,* 537 F.2d 1287 (5th Cir. 1976); *followed, United States v. Garza,* 547 F.2d 1234 (5th Cir. 1977). A fortiori, the delay in Gorthy's case is insufficient standing alone to find a violation of Gorthy's Sixth Amendment right to a speedy trial.

Secondly, the government has proffered no explanation for the 17-month delay between arrest and indictment other than pointing to Gorthy's own statistics which show that 11 United States Grand Juries convened during this period and returned 172 indictments and arguing that these figures show that a crushing burden rested on the

sole prosecutor in that division of the Southern District of Texas. These statistics are not sufficient to support the government's attempted justification. Standing alone they amount to little more than "a 'neutral' factor that may tend to favor" Gorthy. *United States v. Garza,* 547 F.2d 1234, 1235 (5th Cir. 1977). Nonetheless, Gorthy has neither alleged nor shown that this period of delay on the government's part was deliberate. *See United States v. Avalos,* 541 F.2d at 1111-12.

Thirdly, Gorthy presented no formal Sixth Amendment speedy trial motion to the district court until January 27, 1976, a total of 14 months from the date of his arrest. Moreover, 1 month of the 6-month period between the date of Gorthy's indictment and trial was attributable to the actions of Gorthy's attorney in resolving his conflict of interest. These factors are not commensurate with the vigorous assertion of Gorthy's speedy trial right that is now pressed upon the Court. *United States v. Avalos,* 541 F.2d at 1115; *see United States v. Garza,* 547 F.2d 1234 (5th Cir. 1977).

Finally, in determining whether Gorthy was prejudiced as a result of the delay, we note at the outset that he has been incarcerated for only 2 days. His conclusory assertions of anxiety and concern experienced during this period are insufficient to amount to actual prejudice. More significantly, testimony at the hearing on the motion to quash the indictment showed no loss of witnesses or faulty memories or other impairment of Gorthy's ability to prepare his defense. *See United States v. Avalos,* 541 F.2d at 1115-17. In sum, Gorthy has not established a violation of his Sixth Amendment speedy trial right.

AFFIRMED.

APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-3538

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
JOHN PAUL GORTHY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(MAY 19, 1977)

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK
United States Circuit Judge